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2
3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

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6 UNITED STATES OF AMERICA,
7
8 Plaintiff,
9
10 v.
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12 PASTOR PALAFOX, et al.,
13
14 Defendants.
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Case No. 2:16-cr-00265-GMN-CWH

ORDER

16 Presently before the court is the government's motion to compel reciprocal discovery
17 from all defendants (ECF No. 1002), filed August 13, 2018, and defendant Ernesto Gonzalez's
18 response (ECF No. 1131), filed August 31, 2018. The government did not file a reply.

19 Defendants Lopez, Garcia, Morales, Juarez, Lozano, Henderson, Neddenriep, Coleman,
20 Perez, Halgat, Campos, and Voll moved to join Gonzalez's response. (ECF Nos. 1132, 1133,
21 1134, 1135, 1136, 1137, 1140, 1141, 1142, 1143, 1146, 1296).

22 The government moves to compel reciprocal discovery from all defendants under the
23 provisions of Federal Rules of Criminal Procedure 16(b)(1)(A) and (B), and for a standing order
24 that defendants provide prompt reciprocal discovery of evidence discovered prior to trial. It
25 argues that defendants have requested disclosure of evidence under Rule 16(a)(1)(E), and it has
26 previously requested defense discovery, but no discovery has been provided. The government
27 argues that defendants must disclose evidence they intend to use at trial, to include cross-
28 examination.

Gonzalez responds that some defense discovery has been provided to the government,
e.g., Rudnick statements, but notes that his obligation to provide discovery turns on whether he
intends to use the evidence in his case-in-chief at trial. Gonzalez argues that until he is made
aware of the government's witnesses, he cannot decide whether to introduce an exhibit through a

1 government witness rather than his case in chief, and therefore it is premature to provide
2 reciprocal discovery. Additionally, he argues that “case-in-chief” must mean something other
3 than simply “during trial.”

4 Rule 16(b)(1)(A) provides:

5 If a defendant requests disclosure under Rule 16(a)(1)(E) and the government
6 complies, then the defendant must permit the government upon request, to inspect
7 and to copy or photograph books, papers, documents, data, photographs, tangible
8 objects, buildings or places, or copies or portions of these items if:

- 9 (i) the item is within the defendant’s possession, custody, or control; and
- 10 (ii) the defendant intends to use the item in the defendant’s case-in-chief at trial.

11 Rule 16(b)(1)(B) provides:

12 (B) Reports of Examinations and Tests. If a defendant requests disclosure under
13 Rule 16(a)(1)(F) and the government complies, the defendant must permit the
14 government, upon request, to inspect and to copy or photograph the results or
15 reports of any physical or mental examination and of any scientific test or
16 experiment if:

- 17 (i) the item is within the defendant’s possession, custody, or control; and
- 18 (ii) the defendant intends to use the item in the defendant’s case-in-chief at trial, or
19 intends to call the witness who prepared the report and the report relates to the
20 witness’s testimony.

21 Fed. R. Crim. P. 16(b)(1)(A) and (B).

22 Rule 16(d)(2) provides that if a party fails to comply with the rule, the court may (A)
23 order the party to permit the discovery or inspection; (B) grant a continuance; (C) prohibit the
24 party from introducing the undisclosed evidence; or (D) enter any other order that is just under
25 the circumstances.

26 The parties dispute the meaning of the term “defendant’s case-in-chief” in Rule 16(b)(1).
27 Some courts define the term as “[t]he part of a trial in which a party presents evidence to support
28 its claim or defense.” Under this definition, evidence introduced by the defendant during cross-
examination of government witnesses to support her defense should be considered part of
defendant’s “case-in-chief.” However, if the defendant uses a document merely to impeach a
government witness, and not as affirmative evidence in furtherance of her theory of the case, it is
not part of her case-in-chief and need not be disclosed pursuant to Rule 16(b)(1)(A). *See, e.g.,*
United States v. Hsia, 2000 WL 195067 (D.D.C. 2000). Other courts hold that the term “case-in-

1 chief” refers temporally to evidence that a party presents between the time the party calls its first
2 witness and the time the party rests. *See, e.g., United States v. Harry*, 2014 WL 6065705 at *10
3 (D.N.M. 2014). Under this definition, evidence produced during cross-examination of the
4 government’s witnesses would not be considered to have been presented during the defense’s
5 “case-in-chief.”

6 This court is persuaded by the analysis set forth in *United States v. Larkin*, No. 2:12-CR-
7 319-JCM-GWF, 2015 WL 4415506, at *5 (D. Nev. July 20, 2015), indicating:

8 Because a defendant may present her defense through examination of the
9 government’s witnesses, rather than calling them to testify after the government
10 rests, the narrow, temporal interpretation of “case-in-chief” would result in a
loophole in the reciprocal disclosure rule that is contrary to the purpose of the rule.

11 Accordingly, the term or phrase “defendant’s case-in-chief at trial” as stated in Rule
12 16(b)(1) applies to evidence that a defendant intends to present during the examination of the
13 government’s witnesses to support his or her defense, as well as to evidence that the defendant
14 intends to present at trial after the government rests its case. Rule 16(b)(1) does not, however,
15 require a defendant to disclose evidence that defendant intends to use only for purposes of
16 impeachment.

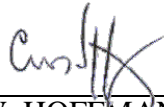
17 Defendants need to know who the government’s witnesses are before they can decide
18 whether to introduce evidence. But the government has not yet announced its witness list.
19 Because defendants do not know who the government’s witnesses will be, defendant Rule
20 16(b)(1)(A) and (B) disclosures are due promptly after the government discloses its trial witness
21 list.

22 IT IS THEREFORE ORDERED that the government’s motion to compel reciprocal
23 discovery from all defendants (ECF No. 1002) is GRANTED. Promptly after the government has
24 identified its witnesses for trial, each defendant is ordered to disclose to the government the items
25 of evidence that he intends to use in his case-in-chief at trial, which includes items of evidence
26 that he intends to use to support his defense during his examination of the government witnesses,
27 as well as evidence the defendant intends to present after the government rests its case. However,
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1 defendant is not required to disclose evidence that he intends to use only for impeachment
2 purposes.

3 IT IS FURTHER ORDERED that motions to join Gonzalez's response by defendants
4 Lopez, Garcia, Morales, Juarez, Lozano, Henderson, Neddenriep, Coleman, Perez, Halgat,
5 Campos, and Voll (ECF Nos. 1132, 1133, 1134, 1135, 1136, 1137, 1140, 1141, 1142, 1143, 1146,
6 1296) are GRANTED.

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8 DATED: December 12, 2018

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12 C.W. HOFFMAN, JR.
13 UNITED STATES MAGISTRATE JUDGE
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